No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),

Appellant,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej",

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Proctors for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Rederiaktiebolaget Frode (a corporation) owner of the Steamship "Frej" and appellee in the above entitled cause, hereby respectfully submits this its petition for a rehearing respecting this Honorable Court's determination on the following two points:

Point I. That the date for valuation of the limitation of liability fund was June 19, 1947, rather than May 8, 1947; and

Point II. That payments by cargo aggregating $8,873.03 for landing fees, manifest fees, handling and wharfage charges should be included in the limitation of liability fund in additon to ocean freight.

POINT I.

Appellee requests rehearing as to the date of valuation solely because of its belief that this Court may have inferred that the appellee considers the voyage of the "Frej" to have continued until June 19, 1947, (a) by reason of certain references in appellee's brief on appeal to "termination of the voyage on June 19, 1947;" and (b) by reason of the vessel's retention of the cargo subsequent to May 8, 1947.

(a)

Appellee's position consistently throughout the proceeding both in the District Court and in this Court has been that the voyage of the "Frej" was automatically terminated by the catastrophe on May 8, 1947, but that in any event the voyage was concluded by appellee's formal abandonment of the voyage on June 19, 1947.

Appellee's position is fairly stated on page 25 of its brief on appeal:

> "Appellee Frode believes, and asserted in the District Court, that the voyage of the 'Frej' was automatically terminated by reason of the damages and stranding resulting from the fire within

the rule recognized by this Honorable Court in *Boston Marine Insurance Co. v. Metropolitan Redwood Lumber Co.,* 197 F. 703 at 712, in which the voyage was deemed terminated at sea by the collision, even though the vessel remained afloat and was towed into port.

"Since the voyage was automatically terminated on May 8, 1947, by the disaster, *a fortiori* the voyage was ended when formally abandoned by Frode on June 19, 1947."

Appellee's brief dealt at greatest length with the question of formal abandonment. It was only appellee's fear of unnecessarily cumbersome draftsmanship that caused it to refrain from restating its belief that the voyage was terminated on May 8, 1947, by the catastrophe with each of its references to the definitively terminating effect of the formal abandonment of June 19, 1947.

Appellee has been consistent in its position, for example, in the petition for limitation of liability it was clearly stated that the voyage terminated on May 8, 1947, and that the limitation of liability fund should be determined as of that date (Apostles on Appeal pp. 5, 8). The *ad interim* stipulation for value pending appraisement likewise recites that the voyage terminated on May 8, 1947 (Apostles on Appeal p. 16). The amended order for monition fixing time and place for filing claims and restraining actions contains a similar recital (Apostles on Appeal p. 25). In petitioner's opening brief on valuation in the trial Court Frode urged the trial Court to fix the limitation

fund as of May 8, 1947. In that respect in the "Conclusion" of the brief it is stated in part:

> "We conclude that:
>
> "(1) The voyage was automatically terminated on the occurrence of the fire, which commenced on May 6, 1947, because the circumstances were of sufficient gravity to break up the voyage;
>
> "(2) Even if incorrect in our first conclusion (with which we are satisfied), alternatively a ship owner has the *power* at any time or place to terminate a voyage, irrespective of the degree of damage to the vessel, and then and there fix the limitation fund, which *power* petitioner exercised by officially and formally abandoning the voyage at San Francisco, California, on June 19, 1947, and this is the latest date and place where and when the vessel is to be valued for the limitation fund."

It is respectfully submitted that appellee has at no time conceded that the voyage of the "Frej" continued beyond May 8, 1947. This Court's ruling that appellee was entitled to terminate the voyage on June 19, 1947, is fully supported by the principles established in previous decisions and generally recognized practice in limitation of liability proceedings, but in no way conflicts with appellee's position that the voyage of the "Frej" was in fact terminated by the catastrophe on May 8, 1947.

(b)

The retention of the cargo by the "Frej" after May 8, 1947, is no indication that the voyage continued.

The vessel had incurred heavy expenses of a general average nature and was entitled to retain possession of the cargo to protect its lien for the cargo's contribution to such expenses, particularly since at no time prior to June 19, 1947, did the appellant request repossession of the cargo at San Francisco.

In this connection it should be noted that it has long been the rule in this Court and in the United States Supreme Court that for limitation of liability purposes the value of the vessel must be taken as of the time that it suffers a catastrophe such as to terminate its voyage.

> "The subsequent history of the wreck can only furnish evidence of its value at the point where the disaster terminated the voyage."
>
> *The City of Norwich,* 118 U.S. 468 at 492;
>
> *Pacific Coast Co. v. Reynolds,* 114 Fed. 877 at 881 (CCA 9, 1902).

In the opinion it is stated in part that Frode "* * * elected to abandon the voyage for carrying Growers' rice stating that it did so pursuant to bill of lading provisions * * *" and also "We do not agree that, having the right then to refuse to continue the voyage, the voyage was then any the less terminated because another reason, rightfully or wrongly, was given for such action—a question we do not decide". To be entirely accurate we respectfully call to this Honorable Court's attention the wording of the notice of abandonment issued by Frode on June 19, 1947, which recited in part (Apostles on Appeal, p. 51):

> "Frej *on account various matters including but not being limited to* extraordinary delays and expenses arising as a result of May 6, 1947 fire and *acting under authority of applicable bills of lading and otherwise* owner and master have elected to abandon voyage * * *"

The wording of the notice clearly indicated Frode was not limiting itself to the exercise of privileges granted by the bill of lading but on the contrary Frode was asserting all rights it had under statute law as well as common law of the sea.

POINT II.

Appellee requests a rehearing as to this Court's determination that certain charges totaling $8,873.03 other than ocean freight should be included in freight for limitation of liability purposes solely because of its belief that this Honorable Court inferred that such charges were treated as freight by the parties (a) by reason of the appearance of the portion of the bill of lading as set forth on page 7 of this Court's opinion, or (b) by reason of the assumption by this Court that the drafting and arrangement of the writing on the face of the bill of lading was prepared by the appellee, or (c) by reason of appellee's failure to prove conclusively that such charges are not charges for services by appellee to the cargo.

The portion of the bill of lading as shown on page 6 of this Court's opinion is an accurate copy of the

illustration appearing on page 12 of appellant's reply brief, but is not an accurate copy of any of the bills of lading in question, and therefore gives an erroneous impression. The word "FREIGHT" appearing on line 1 of page 6 does not appear in this manner on any of the bills of lading. As it actually appears on the bills of lading, it is apparent that it is intended to refer only to the first item, i.e., that of ocean freight. Likewise an additional line is omitted from the illustration, which omission radically changes the impression conveyed by the phrase "FREIGHT TO BE PREPAID/TO COLLECT". An inspection of the form of bill of lading contained in the original record will reveal that the phrase "FREIGHT TO BE PREPAID/TO COLLECT" is not intended to be descriptive of the total of the charges. A correct facsimilie of the pertinent portions of the bills of lading in question is set forth herein as Appendix "A".

Any inference determinable from the arrangement or tabulation of the charges appearing on the face of the bill of lading should be construed against appellant and not against appellee since, although the forms were furnished by the vessel's agent, the forms were filled in and arranged by the appellant's freight forwarder as agent for appellant.

The failure of appellee conclusively to convince this Court that the extra charges were not for services by the vessel to the cargo does not and should not result in the inclusion of such items in the limitation fund where such items do not represent either freight or

earnings of the vessel *for the voyage.* Appellee's major contention in this regard is that the services for which the changes were made were not services to be performed during or *for the voyage.*

Dated, San Francisco,
July 25, 1949.

Respectfully submitted,
CLARENCE G. MORSE,
GRAHAM & MORSE,
Proctors for Appellee.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 25, 1949.

CLARENCE G. MORSE,
Of Counsel for Appellee and Petitioner.

(Appendix "A" Follows)

Appendix.

Appendix "A"

MARKS AND NUMBERS	Quantity or Number of Pieces or Packages	DESCRIPTION OF GOODS	GROSS WEIGHT		FREIGHT
			KILOS	POUNDS	

This document contains information affecting the National Defense of the United States within the meaning of the Espionage Act, 50 U.S.C. 31 and 32, as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law.

This vessel is under bare-boat charter to the United States and which is a Public Vessel of the United States, United States Maritime Commission, on behalf of the United States hereby assumes all liabilities it would have with respect to the carriage of such goods if the vessel were owned by the United States or any Agency or Department thereof and lend-lease cargo. This clause is to be construed only as an agreement that such cargo carrying vessel were a Merchant vessel with respect to liabilities for loss or damage to such cargo.

	1,014,250$	@	.92¢	per 100 lbs.	$	9,331.10
LANDING FEE		@	.05¢	100 LBS. per ~~XXXX~~ lbs.	$	507.13
MANIFEST FEE	ft. in.	@	$1.00 B/L	per cub. ft.	$	1.00
HANDLING	ft. in.	@	.40¢	2,000# per ~~40~~ cub. ft.	$	202.85
WHARFAGE		@	.35¢ PER 2000#		$	177.49
					$	
*FREIGHT TO BE PREPAID/~~TO COLLECT~~					$	10,219.57
*(Cross out words not applicable)					$	